Mohd Za'ba bin Abdul Talib & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05–216 AND 218 OF 2011
APANDI ALI, LINTON ALBERT AND MOHTARUDIN BAKI JJCA
20 MARCH 2013

Criminal Procedure — Police informer — Agent provocateur — Whether informer was agent provocateur — Whether evidence showed arrangement, provocation and suggestion for drug transaction were conducted by informer — Whether adverse inference against prosecution should be invoked for failure to call 'informer' to testify — Whether trial judge misdirected himself in proceeding to hear defence when latter denied access to witnesses offered by prosecution to defence — Whether accused prejudiced and denied of fair trial

The appellants in this appeal were convicted and sentenced to death by the High Court for jointly trafficking in 4,894g cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The main issue in the appeal was whether the informant in the case, who had told a police sergeant ('SP8') that a person named Musa had drugs to sell, had, on the facts of the case, become an agent provocateur and, consequently, whether his failure to testify for the prosecution justified the invocation of adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 ('Act'). The whole of the prosecution's case hinged on the evidence of SP8 who testified that upon being told by the 'informer' that Musa (the second appellant) was looking for a buyer for 5kg of cannabis at RM2,500 per kg, SP8 promptly called Musa on the informer's cellphone and agreed to buy the drugs at the quoted price. After the parties had fixed the place for the deal to be transacted later that evening, SP8 informed his superior about the matter and a briefing was held to set up a police ambush at the venue. The second appellant was the first to arrive at the scene to ensure SP8 had brought the required cash after which the first appellant arrived with the cannabis. The police party arrested both the appellants and recovered the drugs.

Held, allowing the appeals:

(1) SP8 was just the final actor for the final scene. He had never met the supplier of the drugs prior to the police ambush and the arrests of the appellants; all information that formed the basis for the police ambush to be organised came from the informer, as narrated by SP8; and it was only at the briefing to organise the ambush that SP8 was designated to be the drug purchaser (see para 8).

(2) SP8 had himself acknowledged that even before he had spoken to the

second appellant via cellphone, the informer had already told him of the amount of the drugs for sale and its price. From the evidence of SP2, SP7 and SP8, it was clear that the arrangement, provocation and suggestion for the drug transaction were conducted by the informer. The 'informer' was thus an agent provocateur and he could not be termed an 'informer' within the meaning of s 40 of the DDA and could not claim protection under that section (see paras 11 & 13).

(3) The prosecution's failure to call the 'informer' (now concluded to be an agent provocateur) triggered an adverse inference against the prosecution's case under s 114(g) of the Act (see para 17).

(4) Corollary to the defence's need to rebut the presumed creditworthiness of an agent provocateur it was pertinent for the defence to have had access to all the witnesses that were made available at the end of the prosecution's case. The prosecution failed to produce the offered witnesses as they were, in fact, untraceable. The trial judge's decision to proceed with the hearing of the defence despite its handicap in not having access to the offered witnesses was a misdirection which prejudiced and deprived the appellants of their right to a fair trial. The prosecution had failed to prove its case beyond reasonable doubt and the convictions of the appellants was unsafe (see paras 18–19 & 26).

[Bahasa Malaysia summary

Perayu-perayu dalam rayuan ini telah disabitkan kesalahan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana telah secara bersama mengedar 4,894g ganja, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Isu utama dalam rayuan adalah sama ada pemberi maklumat dalam kes ini, yang telah memaklumkan kepada seorang sarjan polis ('SP8') bahawa seorang yang bernama Musa mempunyai dadah untuk dijual, telah, berdasarkan fakta kes, menjadi ejen perangkap dan akibatnya, sama ada kegagalannya untuk memberi keterangan bagi pihak pendakwaan mewajarkan bangkitan tanggapan bertentangan terhadap pihak pendakwaan di bawah s 114(g) Akta Keterangan 1950 ('Akta'). Keseluruhan kes pendakwaan berpaksikan pada keterangan SP8 yang memberi keterangan bahawa apabila diberitahu oleh 'pemberi maklumat' bahawa Musa (tertuduh kedua) sedang mencari pembeli bagi 5kg ganja pada harga RM2,500 per kg, SP8 segera menelefon Musa melalui telefon bimbit pemberi maklumat tersebut dan bersetuju untuk membeli dadah dengan harga yang dinyatakan. Selepas pihak-pihak menetapkan tempat untuk perjanjian dilaksanakan petang tersebut, SP8 memaklumkan ketuanya mengenai perkara tersebut dan taklimat diadakan untuk mengatur suatu pasukan polis serang hendap di tempat tersebut. Tertuduh kedua adalah orang pertama yang tiba di tempat kejadian untuk memastikan SP8 telah membawa wang tunai yang diperlukan

selepas mana perayu pertama tiba dengan ganja. Pihak polis menahan kedua-dua tertuduh dan merampas dadah tersebut.

Diputuskan, membenarkan rayuan-rayuan:

(1) SP8 hanyalah pelakon akhir bagi babak akhir. Dia tidak pernah bertemu dengan pembekal dadah sebelum serangan hendap oleh polis dan penangkapan perayu-perayu; kesemua maklumat yang membentuk asas bagi aturan serangan hendap polis datang daripada pemberi maklumat tersebut, seperti yang diceritakan oleh SP8; dan hanya ketika taklimat untuk mengatur serangan hendap yang SP8 telah dilantik untuk menjadi pembeli dadah (lihat perenggan 8).

(2) SP8 sendiri telah mengakui bahawa walaupun sebelum dia bercakap dengan perayu kedua melalui telefon bimbit, pemberi maklumat telah memberitahunya bahawa jumlah dadah untuk dijual dan harganya. Daripada keterangan SP2, SP7 dan SP8, adalah jelas bahawa aturan, provokasi dan cadangan untuk transaksi dadah telah dijalankan oleh pemberi maklumat tersebut. Pemberi maklumat adalah dengan itu seorang ejen dan dia tidak boleh dikatakan sebagai 'pemberi maklumat' dalam maksud s 40 ADB dan tidak boleh memohon perlindungan di bawah seksyen tersebut (lihat perenggan 11 & 13).

(3) Kegagalan pihak pendakwaan untuk memanggil 'pemberi maklumat' (yang kini disimpulkan sebagai ejen perangkap) membangkitkan inferens terhadap kes pendakwaan di bawah s 114(g) Akta (lihat perenggan 17).

(4) Berikutan keperluan pihak pembelaan untuk menangkis andaian kebolehpercayaan seorang ejen perangkap, adalah penting bagi pihak pembelaan untuk mempunyai akses kepada kesemua saksi-saksi yang dipanggil di akhir kes pendakwaan. Pihak pendakwaan gagal mengemukakan saksi yang ditawarkan kerana mereka sebenarnya tidak dapat dikesan. Keputusan hakim bicara untuk meneruskan perbicaraan pembelaan walaupun terdapat kecacatannya dalam tidak mempunyai akses kepada saksi-saksi yang ditawarkan adalah satu muslihat yang memprejudiskan dan melucutkan hak perayu kepada perbicaraan yang adil. Pihak pendakwaan telah gagal membuktikan kesnya melampaui keraguan munasabah dan sabitan perayu adalah tidak selamat (lihat perenggan 18–19 & 26).]

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kuat v PP [1987] 2 MLJ 336, SC (refd)

Hari Bhadur Ghale v PP [2012] 6 MLJ 597, FC (refd)

Mohd Johi bin Said & Anor v PP [2005] 5 MLJ 409; [2005] 1 CLJ 389, CA (folld)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
Wan Mohd Azman bin Hassan @ Wan Ali v PP [2010] 4 MLJ 141, FC (refd)

Legislation referred to
Criminal Procedure Code s 271
Dangerous Drugs Act 1952 ss 39B, 40, 40A
Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No 45A-2 of 2010 (High Court, Shah Alam)

Lt Kol Roseli bin Abdul Ghani (AG Roseli & Associates) for the first appellant.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the second appellant.
Siti Rafidah bt Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Apandi Ali JCA:

INTRODUCTION

[1] Both the appellants were charged, tried and convicted of an offence of trafficking in dangerous drugs under s 39B of the Dangerous Drugs Act 1952. They were sentenced to death. The charge against the appellants at the High Court reads as follows:

> Bahawa kamu pada 10 Jun 2009, jam lebih kurang 8.30 malam, di Jalan 16, Taman Dato' Harun, Petaling Jaya dalam daerah Petaling di dalam negeri Selangor Darul Ehsan, didapati kamu bersama-sama mengedar dadah berbahaya jenis Cannabis 4894 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibacakan bersama seksyen 34 Kanun Keseksaan.

FACTS OF THE CASE

[2] The whole of the prosecution's case centred on the evidence of one Sjn Wong Soon Meng, SP8. His evidence can be summarised as follows.

[3] SP8 was an agent provocateur, having been instructed by SP2 (ASP Munian a/l Muniandy) to act as such after SP8 had informed him that his informer had information that a male Malay by the name of Musa had drugs to sell. SP8 had assumed the name of Ah Keong. It was his evidence that through the informer he had spoken to Musa over the hand phone where Musa had offered to sell five kilos of cannabis at RM2,500 per kg. After SP8 had agreed to the price Musa told SP8 to meet at 8pm that night (that is on 10 June 2009)

at *taman permainan kanan-kanak* at Jalan 16, Taman Dato' Harun, Petaling Jaya ('the playground'). SP8 told Musa that he would be coming in a Toyota Vios, bearing Registration No WQV 4610 ('Toyota'). SP8 then reported to SP2 about the meeting and SP2 then planned a trap.

[4] At about 7.30pm SP2 and his men had taken up ambush positions at the playground. At about 7.45pm SP8 drove to the playground and parked the Toyota at a spot beside the playground and waited outside the Toyota. About five minutes later a male Malay walked toward him and introduced himself as Musa (whom SP8 identified as the second appellant). It was SP8's version that the second appellant asked for the RM12,500. SP8 showed it to him which was in his sling bag. The second appellant, after having sight of the money, told SP8 that the cannabis would be delivered within 30 minutes and walked away toward the direction he came from.

[5] At about 8.30pm SP8 saw a motorcycle which was ridden by a male Malay. The said male Malay (subsequently identified as the first appellant) approached SP8. He then handed to SP8 a black sling bag and at the same time said '5 kilo ganja ada di dalam'. SP8 checked its contents and upon seeing there were compressed slabs suspected to be cannabis, SP8 then gave the pre-arranged signal to SP2 and his men to arrest the first appellant.

[6] Meanwhile, the second appellant was also arrested by the police ambush party.

ISSUES CANVASSED AT THE APPEAL

[7] Both learned counsel for the appellants concentrated their arguments on the central issue of SP8 being the agent provocateur and the role played by the informer in the whole episode. Arising from such line of arguments, the relevant issues to be determined in this appeal are:

(a) whether, from the facts of the case, the informer has exceeded his role and thus in law is actually an agent provocateur?;

(b) if the answer to the first issue is positive, then the next issue is whether the failure to call the informer as a witness for the prosecution would have triggered the adverse inference under s 114(g) of the Evidence Act 1950?; and

(c) whether the learned trial judge has sufficiently dealt with the two issues above and whether he has given sufficient evaluation of the whole evidence to give effect to the position in law that the evidence of an agent provocateur is rebuttable.

OUR ANALYSIS OF THE AVAILABLE EVIDENCE

[8] Before we deal with the above mentioned issues, it is pertinent to state the following undisputed facts relating to the evidence of Sjn Wong Soon Meng, SP8:

(a) SP8 never met the supplier of the drugs prior to the police ambush and consequential arrests of the appellants on the evening of 10 June 2009;

(b) all information, that formed the basis for the briefing by ASP Munian ('SP2') at 5pm on 10 June 2009 and which led to formation of the police ambush party came from the informer, as narrated by SP8; and

(c) it was only at the said briefing (at 5pm, on 10 June 2009) that SP8 was designated to be the drug purchaser. SP8 was just the final actor for the final scene.

[9] The above salient and undisputed facts can be gleaned from the following evidence of SP2 (ASP Munian), as can be found from pp 28–30 of the appeal records, which reads as follows:

> Pada 10.6.2009 jam lebih kurang 2.00 petang Sjn. Wong Soon Meng memaklumkan kepada saya bahawa sumbernya ingin berjumpa dengan beliau di kawasan Petaling Jaya kerana sumbernya ada maklumat untuk disampaikan kepada Sjn. Wong dan saya membenarkan Sjn. Wong untuk berjumpa dengan sumber tersebut.
>
> Jam lebih kurang 3.30 petang Sjn. Wong telah memaklumkan kepada saya bahawa beliau ada bersama sumbernya di sebuah Restoran Syed di kawasan Petaling Jaya di mana sumber telah memberitahu Sjn. Wong bahawa ada seorang lelaki Melayu dengan panggilan 'Musa' yang dikenali oleh sumber memberitahu bahawa lelaki bernama Musa ini ingin menjual 5 kilogram ganja dan beliau meminta sumber Sjn. Wong mencari seorang pembeli. Menurut Sjn. Wong, *sumber telah memberitahu harga yang ditawarkan oleh Musa ialah RM2,500/- bagi satu kilo ganja.*
>
> Saya telah memberitahu kepada Sjn. Wong supaya beliau bertindak sebagai pembeli dan penyamar sulit dan beliau bersetuju. Lebih kurang jam 3.45 petang Sjn. Wong telah memaklumkan kepada saya bahawa Musa telah bersetuju untuk membekalkan 5 kilogram ganja kepada Sjn. Wong dan lokasinya ialah di sebuah Taman Kanak-kanak, Jalan 16 Taman Dato' Harun. Perjumpaan dan urusan akan dibuat jam lebih kurang 8.00 malam pada hari yang sama.
>
> Saya telah mengarahkan Sjn. Wong untuk menghadiri taklimat jam 5.00 petang di Tingkat 4, IPK Selangor. Saya juga telah arahkan anggota-anggota lain dan dua orang pegawai untuk menghadiri taklimat tersebut.
>
> Dalam taklimat tersebut saya telah memberitahu pegawai dan anggota bahawa pada jam 8.00 malam Sjn. Wong Soon Meng akan bertindak sebagai pembeli ganja sebanyak 5 kilogram daripada seorang lelaki Melayu yang tidak dikenali di Jalan 16 dekat satu taman kanak-kanak. *Maklumat ini hasil daripada sumber Sjn. Wong.*

[10] Corroborative evidence of the said salient facts, on the role of the informer, can be seen in the evidence of one of the members of the ambush party, L/Kpl Samsuri ('SP7') who testified as follows:

> Pada 10.6.2009 jam 5.00 petang saya berada di pejabat Narkotik IPK Selangor mendengar taklimat yang disampaikan oleh Ch.Insp. Munian a/l Muniandy (SP2).
>
> Semasa taklimat, anggota yang turut bersama ialah Ch.Insp. Shukri, Insp. Wong, Sjn. Major Jamaludin, Sjn. Samsul, Sjn. Mazelan, Sjn. Yusof, Kpl. Amiruddin, L/Kpl. Hasdi, L/Kpl. (W) Norsilawati dan L/Kpl. Rahman.
>
> Taklimat oleh Ch.Insp. Munian mengenai satu operasi akan dijalankan di kawasan Jalan 16, Taman Dato' Harun. Maklumat daripada Sjn. Wong satu transaksi akan dilakukan di kawasan tersebut di mana Sjn. Wong sebagai AP (buyer) dan di mana seorang lelaki Melayu sebagai pembekal dikenali dengan nama Musa di mana bekalan dihantar sebanyak 5 kilo dengan harga RM2,500/- sekilo.

[11] It is to be noted that SP8 himself acknowledged that before he talked to the first appellant via handphone, the informer had already informed him of the amount of drug and the agreed price. This can be seen in the cross-examination and re-examination of SP8 (at pp 120–121 of the appeal records) which reads as follows:

> Pemeriksaan balas—oleh Peguam OKT 2
>
> Saya bercakap dengan orang yang dikenali 'Musa' sekali sahaja. Saya guna handphone sumber. Saya tahu nombor telefon 'Musa'.
>
> (Pada masa ini peguam bela bertanya saksi apa yang saksi bacakan semasa memberi keterangan.
>
> Saksi kata dia ada nota catatan dan dia tunjukkan kepada Mahkamah. Dia kata telah merujuk kepada nota ini dari awal keterangannya. Peguam bela pohon untuk melihat nota itu.
>
> TPR tiada halangan nota yang ditulis oleh saksi ditunjuk kepada peguam bela-peguam bela OKT 1 dan OKT 2).
>
> Saya sediakan nota catatan ini dua hari sebelum perbicaraan. Saya ada ID saya. Ini tulisan saya sendiri.
>
> Peguam bela OKT 2 pohon ia ditanda sebagai Ekshibit Pembelaan
>
> Nota yang dicatit SP8—ditanda exh. D35
>
> Pemeriksaan Semula (sambungan)
>
> Nombor telefon 'Musa' ialah 017 6668062 (dengan ingatan saksi ini sendiri).
>
> Sumber yang beritahu saya nombor telefon 'Musa' itu.
>
> Saya bercakap dengan 'Musa' lebih kurang 10 minit. Saya dengar suara dia sahaja. Masa itu saya di restoran Nasi Kandar di Petaling Jaya.

Sebelum cakap dengan 'Musa', sumber telah beritahu 5 kilogram dengan harga berjumlah RM12,500/-.

[12] The law pertaining to the issue of the role of an informer and that an agent provocateur are as provided for under ss 40 and 40A of the Dangerous Drugs Act 1952. The relevant sections, reads as follows:

Protection of informers

40 (1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.

(2) If any book, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named or described or which might lead to his discovery, the Court before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.

(3) If on trial for any offence under this Act the Court, after full inquiry into the case, is of opinion that the informer willfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the Court is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the Court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

Evidence of agent provocateur admissible

40A (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

(2) Notwithstanding any rule of law or this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

[13] From the facts adduced at the trial, namely the evidence of SP2, SP7 and SP8 himself, it is clear that the arrangement, provocation and suggestion for the drug transaction was conducted by the unknown informer. There is a judicial pronouncement by the Federal Court as to what is an agent provocateur. It is 'one who provokes or suggests the commission of an offence

to another person hoping that the latter will go along with his suggestion so that the other person may be convicted of the offence the agent provocateur suggested'. In the *Dictionary of Law* by LB Curzon, he is defined as a person:

> … who enticed another commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such offence.

(See *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141). This was also adopted in *Hari Bhadur Ghale v Public Prosecutor* [2012] 6 MLJ 597.

[14] The next main issue to be dealt with is whether the informer was an agent provocateur. It is trite law, as held in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 that whether a person is an informer or has become an active agent provocateur would depend on the facts of each case. In that case all the informer did was merely to accompany and introduce a police officer to the accused person.

[15] From the facts and circumstances of the case for the prosecution, it is our judgment that the informer cannot be termed as an informer within the meaning of s 40 of the Dangerous Drugs Act 1952 and cannot claim any protection under the said section. The informer's role in this case is akin to that of Francis in *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kuat v Public Prosecutor* [1987] 2 MLJ 336. The informer in this appeal is an agent provocateur.

[16] It is now trite law that although no agent provocateur shall be presumed to be unworthy of credit, such a presumption is still a rebuttable presumption. This position was held in *Wan Azman bin Hassan @ Wan Ali* which held that:

> As for the creditworthiness of an agent provocateur as a witness Spencer Wilkinson J in Teja Singh made the following remarks:
>
> > It appears from the extract above quoted that the learned author of Roscoe's Criminal Evidence classed agents provocateur in the same category as spies, informers and detectives. I have no doubt that there may be witnesses in any of these categories who may be wholly unworthy of credit but in my view the credit of any such witness depends upon the facts of each particular case and not upon the particular label which can be attached to him.
>
> This observation of the creditworthiness of an agent provocateur is now enshrined in s 40A(1) of the Act which now provided that presumption on creditworthiness.
>
> This presumption of being a creditworthy witness is of course rebuttable. It falls upon the defence then to adduce sufficient evidence for the court to conclude that the evidence of an agent provocateur is unworthy of credit (see *Public Prosecutor v Han Kong Juan & Ors* [1983] CLJ Rep 773).

Under s 40A of the Act, the evidence of the agent provocateur cannot be excluded in the exercise of judicial discretion (see *Evidence Practice and Procedure* (3rd Ed), by Augustine Paul). An otherwise admissible evidence such as this one under s 40A of the Act does not become inadmissible merely because it had been improperly or unfairly obtained. Section 40A(2) of the Act affirms this admission notwithstanding any other laws, written or otherwise, to the contrary. He may thus relate the full story of what happened in his negotiations with the drugs seller and any statements made by the latter to him shall be admissible in evidence.

[17] It is also our judgment that premise on the above admissibility and credibility of an agent provocateur, the very failure by the prosecution to call the informer (of which we had concluded to be an agent provocateur) would naturally trigger an adverse inference against the prosecution's case, under s 114(g) of the Evidence Act.

[18] It is also our judgment that corollary to the need by the defence to rebut the presumed creditworthiness of an agent provocateur it is pertinent for the defence to have access to all the witnesses that were made available at the end of the prosecution's case. Unfortunately this was not the situation in this case.

[19] It is clear from the notes of proceedings at the trial that the prosecution failed to produce the offered witnesses. It is also noted that the learned trial judge in deciding to proceed with the hearing of the defence despite the handicap of the defence not having access to the offered witnesses, is a misdirection. Such misdirection had compromised the integrity of a fair trial, particularly of one with a capital punishment.

[20] That particular misdirection can be seen in the notes of proceedings and the ruling made by learned trial judge (at pp 154–155 of the appeal records).

[21] Which reads as follows:

Pihak Pendakwaan diingatkan kali yang kedua ini supaya mengesan dan mengadakan saksi-saksi no. 15 hingga 19 dalam senarai saksi untuk ditemu duga oleh pihak pembela—saksi-saksi itu yang telah diterima oleh pihak pembela.

Pegawai penyiasat hadir hari ini untuk memaklumkan yang dia masih tidak dapat mengesan saksi-saksi itu kecuali saksi no. 16 iaitu Amir Hamzah yang dia katakan hadir hari ini tetapi tidak kelihatan lagi di Mahkamah. Untuk lain-lain saksi I.O hanya telah memohon bantuan IPD Brickfields untuk mengesan semua saksi-saksi itu dan I.O telah menghantar wakil ke Maxis untuk mendapat butir-butir mengenai saksi-saksi itu, dan I.O sendiri tidak berusaha mengesan saksi-saksi itu.

Biarpun begitu kes ini akan terus dijalankan tanpa manfaat di pihak pembelaan untuk menemuduga saksi-saksi itu dan seterusnya membentangkan pembelaan OKT1 dan OKT2.

[22] We also note that the prosecution's case relied heavily on the evidence of SP8. It therefore also involved the issue of the credibility of SP8. To recapitulate, we did earlier referred to certain parts o the evidence of SP8, where the witness was caught referring to some written notes while giving evidence. This particular note was then produced by the defence as exh D35. While under re-examination (at p 121 of the appeal records) the learned trial judge, presumably acting under the provisions of s 271 of the Criminal Procedure Code, made a remark as to the demeanour of the witness, SP8. This particular evidence and remark reads as follows:

> Nombor telefon 'Musa' ialah 017 6668062 (dengan ingatan saksi ini sendiri).

[23] It is our judgment that the particular remark is to denote the sharp memory of SP8. But if one were to see the evidence (at p 121 of the appeal records) as a whole and giving maximum evaluation to the evidence recorded therein, one will realise that the telephone number given was the one as noted in exh D35. That particular number was in fact a revised number after a deletion. This can be seen in exh D35 (can be at p 344 of the appeal records). As such, to our mind, such remark is erroneous and contrary to available evidence.

CONCLUSION

[24] Adopting the approach in dealing with criminal appeals, in *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409; [2005] 1 CLJ 389, we conclude that with the prevailing non appreciation of the evidence as to the role played by the informer and the consequential effect of the non calling of the said informer (who has became an agent provocateur) and couple with other misdirection's as expounded above, the convictions of the appellants are not safe.

[25] We are particularly concerned with the situation where the appellants were prejudiced and deprived of their right to a fair trial, whereby the trial proceeded without them having the benefit to interview and to call the witnesses that were made available to them by the prosecution but in actual fact were untraceable. Such deprivation of the appellants' right had compromised the integrity and impartiality of the whole trial process. On this issue, perhaps it is appropriate to quote what was said by the Supreme Court in the case of *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 at p 142, which reads as follows:

> If some of these claimed witnesses cannot be traced, it was a combination of unhappy circumstances in this case. The accused cannot be penalised for lack of ingenuity in police investigations depriving him of the time-honoured benefit of doubt.

[26] In the light of the above, we conclude that the prosecution has failed to prove its case beyond reasonable doubt. And as the convictions are not safe, we allow the appeals by both appellants. Accordingly their convictions and sentences were set aside and both of them were accorded with the order of acquittal and discharge.

Appeals allowed, convictions and sentence set aside and appellants acquitted and discharged.

Reported by Ashok Kumar